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# Supreme Court of the United States

**OCTOBER TERM, 1949**

**No. 576**

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L. N. JACKSON & CO., INC.,

*Petitioner,*

against

THE ROYAL NORWEGIAN GOVERNMENT,

*Respondent.*

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### Proceedings Below

Petitioner, a New York corporation, seeks to review a decision dated November 10, 1949, of the United States Court of Appeals for the Second Circuit (R. 347) which reversed the decision of the District Court and directed that the action be dismissed (R. 361).

The suit was on the common law side of the United States District Court for the Southern District of New York, and was tried without a jury. The defendant named in the summons and complaint was Oivind Lorentzen, Director of Shipping on behalf of the Royal Norwegian Government and The Norwegian Shipping and Trade Mission (R. 2, 3). As the Royal Norwegian Government was the real party in interest, it appeared and defended.

The suit seeks to hold respondent liable in damages because, in December, 1941, at a time of the greatest national emergency, the respondent, without objection on the part

of petitioner, obeyed a lawful order of the United States Maritime Commission which required the substitution of critical strategic commodities, urgently needed for national defense, in place of a shipment previously booked.

The facts are settled by the findings below and by those of the New York State courts in a related case. The applicable legal principles are not at all novel; they are expressed in the Restatement of the Law of Contract, Section 458, and in the decisions of this Court in *The Kronprinzessin Cecilie,* 244 U. S. 12, and *Texas Company* v. *Hogarth Shipping Co., Ltd.,* 256 U. S. 619, as well as in other well-known authorities, *infra,* pp. 7-12.

The case is reported below in 83 F. Sup. 486 and 177 F. (2d) 694.

## The Facts

In view of the incomplete statement contained in the petition, it is necessary briefly to restate the facts.

The Royal Norwegian Government, at the relevant times a Government in exile, operated, controlled and managed the Norwegian steamship Tropic Star, as owner by requisition, through the agency of The Norwegian Shipping and Trade Mission, of which Mr. Oivind Lorentzen was the Director (R. 336, 255, 276).

Seas Shipping Co., Inc., an American company, was engaged as berth agent to book cargo for the Tropic Star for carriage from Beira, East Africa, to the United States (R. 336) at the instance of the Maritime Commission (R. 285, 160). On November 7, 1941, Seas Shipping Co., Inc., "booked" 1,000 tons of copra for the steamship Tropic Star for carriage from Beira to New York (R. 337) by letter addressed to petitioner's agent W. J. Byrnes & Company reading (R. 239, 240, 63):

> "We have for acknowledgment your letter November 6th and are pleased to confirm that we have booked 1,000 tons COPRA, in bags, for the SS 'Tropic Star', expected to be ready to load at Beira on November

25th, destination New York, rate $22.00 per 2240#, brokerage 1¼%.

We are cabling to our agents at Beira, asking them to arrange with the Manica Trading Company for delivery of the COPRA to the steamer.

It is understood that the freight is collect and will be paid by your principals, Messrs. L. N. Jackson & Co., Inc., upon cable advice that the cargo has been loaded."

More than one month previous to this "booking", on October 4, 1941, the respondent had filed an application with the United States Maritime Commission, under the Ship Warrants Act (Vol. 55 Stats. at L. 591, approved July 14, 1941), for warrants for all of its ships which would or might come to United States ports (R. 349, 203).

One of the conditions in the application was "to give priority to the transportation of material specified by the Commission to the extent of the full cargo carrying capacity of any vessel * * * " (R. 263).

Disobedience to any order issued under the Act entails a fine of up to $5,000 or two years' imprisonment or both (Sec. 6, *infra*, p. 19).

At the time of the "booking", the Tropic Star was undergoing repairs at Durban and, due to war conditions, the repairs took longer than had been anticipated (R. 277). The plaintiff was notified of the delays and continued to extend the time for loading at Beira (R. 277). The United States Maritime Commission had been notified of the above booking, a copy of the letter of November 7th being sent to it, and had approved it (R. 205).

On December 22, 1941, Mr. A. E. King, Assistant Director of the Division of Emergency Shipping of the United States Maritime Commission, notified Mr. S. J. Maddock, vice-president of Seas Shipping Co., Inc., by telephone that the 1,000 tons of copra, booked for the Tropic Star, would have to be cancelled and wool substituted (R. 165). Maddock objected vigorously, telling King that "he ought to let the copra move on the ship if he possibly could" (R. 165). Mr. King said: "Notwith-

standing that, the OPM have said you have to move the wool * in every bottom that is moving, and you will have to cancel the copra * * * *" (R. 168); and on the same day telegraphed Seas Shipping Company (R. 278):

> "Tropic Star due to requirements for critical strategic commodities please cancel booking 1000 tons copra substitute sisal wool. Confirm.
>
> A. E. KING
> U. S. Maritime Commission."

Immediately on receipt of this telegram, Seas Shipping Co., Inc., notified petitioner's brokers, by telephone, and wrote them a letter reading (R. 297, 225):

> "We have been instructed by the Maritime Commission to cancel this booking of 1000 tons of copra * * * and would thank you to advise your principal accordingly."

Petitioner made no complaint or protest to respondent or Seas Shipping Co., but by direct application to Mr. King sought, without success, to have this order rescinded (R. 222, 223).

On December 31, 1941, Seas Shipping Co., Inc., telegraphed Mr. King for further instructions, transmitting a complaint of the suppliers at Beira (not the petitioner) that they had incurred heavy expense in bringing the copra to the loading port (R. 278).

On January 2, 1942, Mr. King replied (R. 279):

> "Ytd. Tropic Star Copra. Can only reiterate urgent defense requirements make necessary carriage of essential commodities accordance our previous instructions."

Because of this order of the Maritime Commission, respondent was unable to carry the copra.

---

* The U. S. Government had purchased a big block of wool in East Africa which had to be promptly moved (R. 189).

**The prior decision in the New York State Courts which held that the order of the United States Maritime Commission discharged any obligation assumed under the booking**

In view of its understanding that its contract was with Seas Shipping Co., Inc., petitioner first sued Seas Shipping Co., Inc., as the contracting party in the New York Supreme Court. The summons and complaint, in which it is alleged that Seas Shipping Co., Inc., agreed to carry the copra, is at R. pp. 304-308, 229.

The case was tried by Mr. Justice Irving L. Levey, sitting without a jury, in March, 1945, and his opinion dismissing the suit, reported in *L. N. Jackson & Co. Inc.* v. *Seas Shipping Co., Inc.*, 185 Misc. (N. Y.) 94, 56 N. Y. S. (2d) 501. The important parts of his opinion are (185 Misc. p. 95):

> "In this action the plaintiff seeks to recover, as damages, certain profits representing the difference between the contract and market prices of 1,000 tons of copra which, as plaintiff alleges, the defendant had failed to load, contrary to agreement, on the S.S. *Tropic Star*, at the port of Beira, East Africa, on November 25, 1941, and transport to New York.
>
> The Norwegian Shipping and Trade Mission had authorized the defendant, as a berth agent, in or about the early part of October, 1941, to book freight for the afore-mentioned S.S. *Tropic Star*, scheduled to sail from the said port of Beira during November, 1941, but advised the defendant at the same time that the vessel was then laid up in Durban, distant about eight hundred miles, awaiting repair parts from England.
>
> The defendant, anticipating probable delay, booked the cargo for the plaintiff through the latter's broker, with the express provision that the ship was 'expected to be ready to load at Beira on November 25th, destination New York.'"

After reference to the delay in loading, Mr. Justice Levey's opinion continues (185 Misc. p. 95):

> "Then occurred the fateful Pearl Harbor incident and every available facility was employed and requisitioned by government agencies to expedite delivery of those strategic materials deemed necessary for our defense and war effort. In this connection, the United States Maritime Commission on December 22, 1941, confirmed subsequently on January 2, 1942, ordered the immediate cancellation of the carriage of copra in the following telegrams: * * *."

The opinion then quotes the two telegrams of the Maritime Commission of December 22, 1941, and January 2, 1942, requiring cancellation of the booking (*supra*, p. 4).

The opinion continues (185 Misc. p. 96):

> "I further find that the defendant was justified in complying with the order of the United States Maritime Commission, the latter acting in conformity with the provisions of the United States Ship Warrants Act (U. S. Code, tit. 50, Appendix, § 1281 et seq.). Refusal to obey the cancellation order would have subjected the owner not only to severe penalties but also would have cast a sinister reflection on the attitude of the defendant and the owner toward our war effort.
>
> This direct intervention by a government mandate in one of the most perilous periods of our nation's history embodied every element significant and essential for a complete frustration so as to excuse, without question, performance on the part of the defendant. (*Matter of Kramer & Uchitelle, Inc.*, 288 N. Y. 467; *Mawhinney* v. *Millbrook Woolen Mills*, 231 N. Y. 290; *Nitro P. Co.* v. *Agency of C. C. and F. Co.*, 233 N. Y. 294; *Matter of Gunze Silk Corp.* [Rudolph Corp.], 266 App. Div. 541; *Matter of Kahn & Feldman, Inc.* [Rothchild], 265 App. Div. 470, affd. 290 N. Y. 781.)"

The findings of fact and conclusions of law of Mr. Justice Levey are at R. 299-304.

Petitioner appealed to the Appellate Division, which affirmed without opinion (270 App. Div. 830), as did also the Court of Appeals (296 N. Y. 529).

As the State courts had held petitioner's claim unmeritorious, it commenced this new action in the United States District Court.

## FIRST POINT

**The order of the United States Maritime Commission cancelling plaintiff's booking of 1,000 tons of copra and directing the respondent to substitute other shipments excused performance.**

The rule is stated in the Restatement of the Law of Contracts (American Law Institute), Section 458, (p. 852):

> "§ 458. *Supervening Prohibition or Prevention by law.*
>
> A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited
>
> (a) by the Constitution or a statute of the United States, or of any one of the United States whose law determines the validity and effect of the contract, or by a municipal regulation enacted with constitutional or statutory authority of such a State, or
>
> (b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States."

To the same effect, Williston on Contracts, Rev. Ed., Secs. 1938, 1939.

In the present instance, performance was prohibited by an administrative order of the United States Maritime

Commission, with the result that the case at bar comes squarely within the above well-settled rule. The circumstances do not show any "contrary intention" nor was there any "contributing fault". These are the only two exceptions recognized.

In the District Court, the defendant was held liable on the ground that the principle of frustration

> "does not apply where the intervening event is reasonably foreseeable and could and should have been controlled by provisions of such contract" (R. 332, further discussed *infra*, pp. 9-12).

The above statement is contrary to the well-settled rule of law as established by such well-known and authoritative decisions as *The Kronprinzessin Cecilie*, 244 U. S. 12; *Texas Co.* v. *Hogarth Shipping Co., Ltd.*, 256 U. S. 619; *In re Shipton Anderson & Co.*, 1915, 3 K. B. 676; *Matter of Kramer & Uchitelle*, 288 N. Y. 467; and *W. J. Tatem, Ltd.* v. *Gamboa*, 1939, 1 K. B. 132, see *infra*, pp. 9-12. Furthermore, in the case at bar, the "intervening event" was *not* reasonably foreseeable; this the District Court overlooked.

The booking in this case was made on November 7, 1941, and the ship was expected to be ready to load at Beira on November 25th, about 2 weeks later. It has been stipulated that——

> "On November 7, 1941, when the booking to carry the copra was entered into, it was reasonably to be expected that the ship would be ready to load at Beira on November 25, 1941" (R. 277).

The previously given permission to carry plaintiff's copra was revoked because of the combination of the following unexpected events:

1. Unanticipated delay in completing the ship's repairs;

2. The unanticipated attack on Pearl Harbor on December 7, 1941, during that delay, and the entry of the United States into the war;

3. During the unforeseeable continuance of that delay, the Office of Production Management

> "undertook a review of all ship assignments of homebound materials coming to this country to * * * confine the use of all shipping coming toward the United States to the highest priority materials.
>
> That is the background of sending this telegram [of December 22, 1941] to eliminate copra and substitute sisal and wool * * * *" (R. 200).

If the ship had not been delayed and if the United States had not become involved in the war, and if the Government had not decided to give priority to sisal and wool, the Maritime Commission would not have ordered the cancellation of the previously approved booking. The combination of these unusual events was unforeseeable when the booking was made.

In *The Kronprinzessin Cecilie,* supra, the ship had, on July 27, 1914, issued bills of lading for shipments of gold to be delivered at Plymouth and Cherbourg, and sailed from New York on July 28th.

At the dates mentioned, the possibility, and even probability, of a European war was clearly foreseeable by reason of public events recited in the opinion of the lower court.

On July 23rd, Austria had sent an ultimatum to Servia. On July 24th, Russia stated that, if Austria made war on Servia, Russia would intervene, and France gave notice that she would side with Russia.

The situation continued to deteriorate by severance of diplomatic relations, mobilizations and proclamations of martial law until on July 28th, war was formally declared between Austria and Serbia. A few days later all the great powers were involved.

It was held that the change in circumstances due to war conditions, although clearly foreseeable when the cargo was received, justified the ship in putting back to the

United States and in failing to make delivery of it at destination. Mr. Justice Holmes said for this Court (p. 22):

> "With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was 'arrest and restraint of princes, rulers or people,' other exceptions necessarily are to be implied, at least unless the phrase 'restraint of princes' be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine* v. *Jane*, Aleyn, 26, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed. *Baily* v. *De Crespigny*, L. R. 4 Q.B. 180, 185. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. *Taylor* v. *Caldwell*, 3 Best & Smith 826, 839. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. *Lakeman* v. *Pollard*, 43 Maine, 463. The same principles apply to contracts of shipment."

In *Texas Co.* v. *Hogarth Shipping Co., Ltd.*, supra, a British steamship company had, in February, 1915, chartered its steamer to the Texas Company to carry a cargo from Port Arthur to South Africa.

On April 10, 1915, the British Admiralty, pursuant to a Royal Proclamation of the preceding August, telegraphed the owner: "The Baron Ogilvy is requisitioned under royal proclamation for government service." The contract was, therefore, not performed.

The Texas Company's suit for damages was dismissed on the ground that obedience to a lawful governmental order excused performance.

In *Texas Co.* v. *Hogarth*, supra, the charter party was entered into after England had been at war for many

months, and requisitions under the Royal Proclamation of August 3, 1914, were common. However, as stated by this Court, "there was no provision [in the charter party] casting the risk on either party" (p. 631).

This Court said (pp. 629, 631):

> "It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it."
>
> • • • • • • •
>
> "Both [owner and charterer] assumed that the ship would remain available and that was the basis of their mutual engagements. These, we think, must be regarded as entered into on an implied condition that, if before the time for the voyage the ship was rendered unavailable by such a supervening act as the requisition, the contract should be at an end and the parties absolved from liability under it."

In *In re Shipton, Anderson & Co.*, 1915, 3 K. B. 676, cited with approval in *Texas Co.* v. *Hogarth, supra,* at page 630, Shipton, Anderson & Co. had, by a contract of September 2, 1914, agreed to sell a quantity of wheat lying in a warehouse in Liverpool.

On September 8th, prior to delivery, the sellers received a written requisition under a British statute which had come into force on August 7th, requiring them to deliver the wheat to the British Government. The possibility of governmental intervention was foreseeable and could have

been, but was not, guarded against in the contract. Darling, J., said (p. 684):

> "We are in a state of war; that is notorious. The subject-matter of this contract has been seized by the State acting for the general good. *Salus populi suprema lex* is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it."

In *W. J. Tatem, Limited* v. *Gamboa,* 1939, 1 K. B. 132, the headnote reads:

> "If the foundation of a contract goes either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated, *even though the event which causes the destruction of the subject-matter or the interruption or delay was within the contemplation of the parties when they made the contract.*" (Italics ours.)

To the same effect;

> Williston on Contracts, Rev. ed., § 1953.
> *Matter of Kramer & Uchitelle,* 288 N. Y. 467.

The cases cited in the District Court's opinion do not support its conclusion.

*Berline* v. *Waldschmidt,* 159 Kansas 585, 156 P. (2d) 865 (R. 997), was a suit to extend the term of a mineral deed, otherwise due to expire, for the period during which a test well could not lawfully be drilled on the property because of war-time regulations. There was no provision in the deed authorizing an extension under such circumstances and hence no extension was granted. In that case, the plaintiff was asking that the time for performance of the contract be extended in its favor because of the war-time restriction. It was not a case like the present, where

the defendant is sought to be cast in damages because its performance was prevented by governmental order.

*State Mutual Life Insurance Co.* v. *Gruber,* 269 App. Div. (N. Y.) 170 (R. 996), is typical of the other authorities cited in the District Court opinion. In that case, the defendant had leased plaintiff's factory in order to manufacture so-called "sextants" for the Government. Shortly after the lease had been executed, the Government cancelled the manufacturing contract. It was held that this did not release the defendant from liability under the lease, because the lease did not become illegal and the defendant could have used the leased property for other purposes. The Court said (p. 173):

> "The present case is readily distinguishable from instances where the performance of the contract between the parties has been rendered illegal by act of law. (*Matter of Kramer & Uchitelle, Inc.,* 288 N. Y. 467.) No law has rendered illegal the performance of the lease and the payment of rent, nor has any governmental order, statute or proclamation abrogated that contract."

Some additional authorities on this branch of the case are cited by the Court of Appeals, particularly at R. 352, 355, 358, 359.

The District Court implied that the loss was suffered by reason of a contract voluntarily entered into and that, however praiseworthy the motives, the defendant must pay the penalty.

The effect of the Warrant Act was to create a condition of status, and this status applied to all vessels which traded to the United States, except Spanish and Portuguese (R. 353).* All American, all British, all Norwegian, all Canadian and all Panamanian vessels, among others, had warrants. Petitioner alleged under oath in its State court complaint (R. 305, 306, 229), that the contract was made with the Seas Shipping Company, an American company,

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*No Argentine vessels came to U. S. ports; hence they did not take out warrants (R. 142).

as principal, and it must therefore have realized that the carriage was subject to the Warrant Act. It was a condition known throughout the shipping world. That practically all ships were subject to the Act was demonstrated by the fact that the plaintiff could not get substitute space for its copra, and apparently ceased all efforts when notified by Mr. King of the Maritime Commission that there was no hope for any space (R. 223).

Nor was an application for warrants voluntary in any true sense of the word. Warrant-holding vessels were entitled to the preference, which meant that the turn of unpreferred vessels would come only after such interminable delays as would make the transportation and delivery of cargo impossible (R. 141, 201, 354).

Some other arguments made by the petitioner will be briefly discussed.

(1) Petitioner claims that it was not charged with knowledge that the respondent was subject to the order of the Maritime Commission.

This contention we consider immaterial but, in any event, petitioner is clearly charged with knowledge of the situation.

As already pointed out, *supra*, pages 5, 13, petitioner believed that it was contracting with Seas Shipping Company, Inc., a New York corporation (R. 305), which would unquestionably be subject to the Warrants Act so that petitioner is in no position to claim surprise.

The "booking" on which petitioner's suit is founded shows on its face that a copy was sent to Mr. A. E. King, Assistant Director, Emergency Shipping, of the Maritime Commission, a clear notice that it was subject to Maritime Commission control (Ex. 1, R. 240, 63).

With reference to the contention that petitioner had no knowledge of the then effective governmental control through Ship Warrants, the Court of Appeals said (R. 356, 357):

> "This passes belief. It is to be noted that plaintiff presented no evidence on this point at all, its entire

case being limited to the documents showing the agreement and its cancellation. These disclose that each of the parties acted through an American shipping agent. That the agent acting for plaintiff had so little knowledge of his business that he did not know the then most important development in it, that, indeed, he had no suspicion even when the crucial letter showed on its face that it was going forward to the governmental agent in actual control of American shipping, is not easy to accept. Were such to be the fact, it would mean that he knew no more than to ship by a vessel for which there was no assurance of its ever docking and unloading in contrast to the more favored carriers who either were of necessity under the system or had accepted it. At most this seems to us clearly a case within the authorities that plaintiff should have known of the existence and operation of the system substantially as fully as the defendant, that defendant could reasonably have so concluded, and hence that there was no arbitrary obligation on the defendant to protect itself by express stipulation against the operation of the system. This is borne out by the nature of the contract itself, which is in form a reservation of space for the goods in this vessel for the voyage. Obviously it does not assume to set forth the detailed obligations of the parties. No obligation at all is stated for the shipper, except to pay the freight upon the cabled advice that the cargo has been loaded. On the carrier's side, it may be noted that no attempt is made to state even the standard condition, referred to above, that the vessel shall not have been destroyed before the start of the voyage."

Petitioner, an international trader on a large scale, cannot seriously claim to be ignorant of what was known to everyone else.

As stated in *The Tompkins*, 13 F. (2d) 552, 554, C. C. A. 2:

> "Knowledge of facts, which to the mind of a man of ordinary prudence, beget inquiry, is actual notice, or, in other words, is the knowledge which a reasonable investigation would have revealed." (Quoted from *Fidelity & Deposit Co.* v. *Queens City Trust Co.*, 226 N. Y. 225, 233.)

(2) The authority of Mr. A. E. King to require cancellation of the booking is established by his official appointment, Exhibit I (R. 282), and by the testimony of Mr. H. Robson, Mr. King's superior, that Mr. King had authority to sign the telegrams requiring cancellation (R. 140, 145, 146).

(3) The Tropic Star was clearly subject to the Ship Warrants Act, although no vessels were specifically named in the application.

The Ship Warrants Act (55 Statutes at Large 591, 50 U. S. C. A. App. Sec. 1281), Section 1, provided that warrants might be issued to foreign flag vessels on application and that "such application shall be in such form as the United States Maritime Commission may prescribe".

The respondent herein made application to the Maritime Commission for warrants in the prescribed form and that application was accepted and filed (Exhibit B, R. 259, 271, admitted without objection R. 85). By signing, respondent agreed that it would "truly and faithfully observe and carry out these uniform conditions" among which was the obligation "to give priority to the transportation of materials specified by the Commission" (R. 263).

By reason of established practice, the Maritime Commission and the respondent considered the Tropic Star and all other like vessels subject to the Warrants Act. This was found below (R. 337, 353), and also in the New York State Court litigation (R. 302).

(4) Petitioner's argument, that the respondent profited because of the cancellation is trivial. Whether or not the cancellation resulted in a profit to the petitioner was not a proper subject of litigation, nor was it in fact litigated. A governmental order may result in a profit to the party whose performance is prevented, as in *The Claveresk*, 264 Fed. 276, but it makes no difference whether it results in profit or loss.

(5) Petitioner also suggests that the respondent should have contested the order of the Maritime Commission and

refused to obey it. The petitioner *did not request the respondent to take any such action,* nor did the petitioner on its own behalf take any steps, except to obtain confirmation from Mr. King that no ship would be available (R. 223). At a time of the greatest national emergency, like that immediately succeeding Pearl Harbor, there could be no obligation on the respondent officiously to contest or disobey lawful government orders.

(6) Petitioner particularly relies on *Baker Castor Oil Co.* v. *Insurance Co. of No. America,* 157 F. (2d) 3, C. C. A. 2; *Northern Pac. Ry. Co.* v. *American Trading Co.,* 195 U. S. 439; *Swayne & Hoyt* v. *Everett,* 255 Fed. 72.

The *Baker Castor Oil* case, distinguished by the Court of Appeals (R. 358), was a suit on a policy of insurance. In *The Kronprinzessin Cecilie, supra,* pp. 8, 9, this Court pointed out (244 U. S. p. 23) that insurance cases "throw little light upon the standard of conduct to be applied" where the shipowner is sued for non-performance.

In the *Northern Pacific Railway* case, where a vessel's sailing was delayed by the mistaken act of a Deputy Collector of Customs, this Court said, 195 U. S. at 467:

> "There was no intervention of the Government of the United States."

At page 468:

> "It was not an act of the state—but a mistaken act of a subordinate official not justified by law * * *."

*Swayne & Hoyt* v. *Everett* involved a tender of a shipment at Shanghai to an American Steamship Company by an American citizen for carriage to the United States. At the time of the tender, which was made prior to the entry of the United States into the first World War, the steamship company's Shanghai agent was a British subject who refused to accept the shipment on the ground that the consignee in the United States was on the British blacklist. Neither this nor any of the other cases cited have any proper bearing on the decision in the case at bar.

(7) For no easily discernible reason, petitioner quotes at great length from the testimony of two of the witnesses at pages 48-54 of its brief. The contention seems to be that Norway and the United States were on an equality from which premise nothing of importance follows.

In the present instance, the respondent had signed the ship warrant application which reads (R. 262):

> "The applicant agrees to the uniform conditions approved by the Commission and dated August 25, 1941, and will truly and faithfully observe and carry out these uniform conditions."

One of these "conditions" was "to give priority to the transportation of materials specified by the Commission" (*supra*, p. 3).

As regards the matters here pertinent, therefore, respondent had agreed to obey the orders of the Commission.

The Restatement of the Law of Contracts, Section 454, page 843, reads:

> "In the Restatement of this subject impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."

For the respondent to have defied the order of the Maritime Commission would have resulted in extreme and unreasonable injury to the respondent in view of its close relations with our Government and its obligation as one of the original members of the United Nations; defiance would have "cast a sinister reflection" upon respondent's attitude "toward our war effort" (Levey, J., *supra*, p. 6).

Irrespective of the Warrants Act, obedience to the order of the United States Maritime Commission, given in the most perilous period of our nation's history, furnishes an excuse.

(8) Petitioner makes the unfounded statement that the Court of Appeals decided the case on a novel theory, not previously formulated.

On the contrary, the basic ground of the Court of Appeals' decision is the same as that relied on in the prior litigation in the New York State Courts, *supra*, pages 5, 6.

*The dissenting opinion of Judge Learned Hand.* Judge Hand did not vote to affirm the decision of the District Court, nor differ from the rules of law stated in the opinion of Judge Clark, concurred in by Judge Swan. His view, that a new trial should be ordered, was based on his failure to give full consideration to the proved facts.

His conclusion was (R. 362):

> "Therefore, I think that the defendant had the burden of proving (1) either that the Commission would have coerced or at least would have requested the defendant to repudiate its contract; or (2) that the plaintiff would have engaged the space in the 'Tropic Seas' (sic), even if it had known that the defendant had already consented to take out warrants for its ships."

(1) The Maritime Commission, speaking through Mr. King, in fact "requested the defendant to repudiate its contract". On December 22, 1941, the Maritime Commission telegraphed:

> "Cancel booking 1000 tons Copra substitute Sisal wool" (*supra*, p. 4).

On January 2, 1942, the Maritime Commission again telegraphed:

> "Can only reiterate urgent defense requirements make necessary carriage of essential commodities accordance our previous instructions" (*supra*, p. 4).

The matter was not one of negotiation. The respondent had, by signed agreement, become subject to the direction of the Maritime Commission. Under Section 6 of the Warrants Act, drastic penalties are provided for disobedience to any rule, regulation or order issued under the authority of the Act, as follows:

> "SEC. 6: Whoever wilfully violates any rule, regulation or order issued under the authority conferred

herein shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years or both."

In case of disobedience on the part of respondent's officials, it would have been the duty of the Department of Justice to obtain an indictment of the guilty persons.

(2) The evidence already in the case makes it clear that the petitioner would have engaged space on the Tropic Star whether or not it knew that the respondent had filed an application for Ship Warrants. Indeed, petitioner thought its contract was with an American company on whom the Warrants Act would be binding (*supra*, pp. 5, 13).

Petitioner alleged in its complaint that ships were in short supply and, in substance, that the Tropic Star was the only vessel available to lift the copra (R. 5). Shipping space was then available for only 40% of the OPM requirements (R. 139).

As no other ships were available, petitioner had everything to gain and nothing to lose by making the booking on the Tropic Star and the slight risk of prevention by governmental order was inconsequential. If the transaction went through, as seemed almost a certainty in November, 1941, a handsome profit would be realized. If, on the other hand, the Tropic Star was not permitted to load, petitioner could sustain no out-of-pocket loss.

## SECOND POINT

**There is no special or important reason for granting a writ of certiorari in the case at bar.**

A writ of certiorari will be granted "only where there are special and important reasons therefor" (Rule 38, Sec. 5). Subdivision B of Section 5 specifies the class of cases where a writ of certiorari will be granted to review a decision of the Court of Appeals, as where the decision is in

conflict with the decision of another Court of Appeals on the same matter, or where it is in conflict with applicable local decisions, etc.

There is no decision of any other Court of Appeals at variance with the decision now under discussion, nor is there any "conflict with applicable local decisions", because the decision of the Court of Appeals is squarely in accord with the decision of the New York Courts in *L. N. Jackson & Co.* v. *Seas Shipping Co., Inc.*, which was taken through all of the New York Courts, *supra*, page 7.

As pointed out, *supra*, page 2, and by the Court of Appeals (R. 357, 358), the case at bar involves nothing more than the application of well-settled principles to a state of facts similar to those in many adjudicated cases.

## THIRD POINT

### The defense of *res judicata*.

Respondent set up in its answer that the decision in the New York State Court afforded a complete defense to the later suit brought by petitioner in the United States District Court on the ground of *res judicata*.

The District Court held the defense of *res judicata* inapplicable, on the ground that the New York Court of Appeals *might have based its affirmance* on the agency point alone (R. 332). This overlooks the well-settled rule stated in Vol. 34, Corpus Juris, Article on Judgments, Sec. 1190, p. 773, as follows:

> "A general affirmance of a judgment on appeal makes it res judicata as to all the issues, claims, or controversies involved in the action *and passed upon by the court below*, although the appellate court does not consider or decide upon all of them, * * *." (Italics ours.)

The Court of Appeals expressed no opinion on this defense.

In tort the law is well-settled that, where suit is first brought against an agent, and the suit is dismissed because the plaintiff fails to prove a cause of action, that decision is *res judicata* of a later suit against the agent's principal to recover for the same damage. *Good Health Dairy Products Corp.* v. *Emery,* 275 N. Y. 14, 18. The same principle must apply in a contract case where it has been decided in the prior suit against the agent that no actionable breach of contract exists because performance was prohibited by valid governmental order.

## LAST POINT

**The petition for a writ of certiorari should be denied.**

Dated, New York, February 20, 1950.

Respectfully submitted,

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